86-828

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHWESTERN SHEET METAL WORKS, INC.,
Petitioner,

v.

SEMCO MANUFACTURING, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a local labor union which secretly aligns itself with a manufacturer and intentionally excludes the manufacturer's competitor causes cognizable "antitrust injury" when it grants a favorable wage rate to the manufacturer and withholds it from the competitor, thereby unlawfully bestowing an exclusive anti-competitive cost advantage on the manufacturer, and when the competitor, Petitioner herein, adduces the following evidence of its loss:

a. That Respondent entered into a secret pre-hire agreement with a local labor union to unlawfully confer uniquely favorable union wage rates upon Respondent intending thereby to place Petitioner at a competitive disadvantage;

b. That Respondent thereafter used its unique, anticompetitive wage advantage to structure its bids on certain construction projects;

c. That the only two manufacturers of spiral pipe and fittings that bid based on labor costs in the pertinent union jurisdiction were Petitioner and Respondent;

d. That throughout the period that Respondent bid with the unlawful union wage advantage it was in direct competition with Petitioner for construction projects nationwide;

e. That Petitioner's bids on numerous identified construction projects would have been lower than Respondent's bids but for the unlawful advantage;

f. That the record did not contain evidence establishing that third party bidders existed on all such projects, the amount of such third party bids, or their competitive position relative to Petitioner and Respondent; and

g. That Petitioner suffered substantial economic loss to its business during the period that Respondent bid with the unlawful union wage advantage, including (i) a loss of construction projects; (ii) a dramatic reduction in its backlog of bid orders; (iii) a sharply reduced profit margin on projects for which it bid, including those it actually received; (iv) its salesmen experiencing a startling adverse reaction to the company's bidding opportunities and success rate; and (v) its inability to negotiate freely for a beneficial labor contract.

2. Whether the Fifth Circuit's requirement that a private antitrust plaintiff foreclose all alternative potential causes, or disprove intervening or supervening sources, of its damage in establishing injury under Section 4 of the Clayton Act constitutes such an extreme and unwarranted elevation of the previously recognized burden of proof in antitrust cases that it threatens to reduce private enforcement of the antitrust laws to a near nullity.

LIST OF PARTIES AND OTHER INTERESTED PERSONS

The parties to the proceedings below were the Petitioner Southwestern Sheet Metal Works, Inc., the Respondent Semco Manufacturing, Inc., and Henry V. Mesa. Mesa, co-defendant in the U.S. District Court action, was not a party to the Fifth Circuit appeal, and is not before the Court as a party to these proceedings.

The following persons and entities not listed in the caption have an interest in the outcome of these proceedings. These representations are made for purposes of consideration in evaluating possible disqualification or recusal.

Henry V. Mesa, Defendant (Non-Appealing).

Limbach Corporation, Parent of Semco Manufacturing, Inc.

International Sheet Metal Workers Union.

Local 49 of the International Sheet Metal Workers Union.

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SEMCO MANUFACTURING, INC.,
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The Petitioner, Southwestern Sheet Metal Works, Inc. ("Southwestern") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit filed May 5, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 3) is reported at 788 F.2d 1144. The District Court did not issue a formal opinion. The District Court's Judgment, Order, and Jury Verdicts are set forth at Appendices 4-7, respectively.

JURISDICTION

The judgment of the Court of Appeals (Appendix 1) was entered on May 5, 1986 and the Fifth Circuit's denial of Southwestern's Petition for Rehearing En Banc was entered on August 25, 1986 (Appendix 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966), Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

STATUTES INVOLVED

The statutory authorities involved in this Petition are set forth in full text at Appendices 8 and 9.

STATEMENT OF CASE

This dispute involving a restraint of free trade originated between two union employers that manufacture spiral pipe and duct fittings, and centered around their respective relationships with Sheet Metal Workers Union Local 188 (the "Local"): (1) Southwestern Sheet Metal Works, Inc. ("Southwestern"), the Petitioner herein, and (2) Semco Manufacturing, Inc. ("Semco"), the Respondent herein.

At all material times, Southwestern and Semco directly competed for construction projects throughout the United States. Southwestern's cause of action charged a violation of Section 1 of the Sherman Act arising out of a secret labor agreement entered in 1981 between Semco and Henry V. Mesa ("Mesa"), who was then the union representative for the Local. Semco and Mesa secretly agreed to set wage rates Semco would pay for union labor in a manufacturing plant Semco proposed to build in Sunland Park, Texas. The new agreement permitted Semco to use production workers, the lowest paid union workers, in the fabrication of spiral pipe and fittings. The Local previously prohibited the use of these workers on any spiral pipe construction jobs. At the time, Semco had no existing facilities or workers in the Local's

jurisdiction, which covers sheet metal workers in the El Paso/Southeastern New Mexico area. Only two spiral pipe and duct fittings manufacturers, Southwestern and Semco, operated or bid out of plants in that area during the period applicable to Southwestern's claim.

Semco and Mesa, through deliberate acts of secrecy, kept the terms of their agreement hidden from the Local, the national Union and Southwestern. Southwestern had no opportunity to negotiate for similar wage terms, because neither Semco nor Mesa would admit to the existence of the wage agreement. Even after Semco began bidding out of Sunland Park using the secret wage rates, moreover, Semco and Mesa consistently denied having entered into any agreement.

The record showed that Semco knew the clandestine agreement was an unlawful pre-hire agreement which local workers had not seen, much less formally approved. Its secrecy was a veiled attempt to jeopardize Southwestern's competitiveness.

Semco thereafter used its secret and exclusive union wage terms to calculate its bids on construction projects nationwide. Southwestern competed directly with Semco on approximately 90% of these projects. The secret and unique wage advantage reduced Semco's bids substantially. Therefore, Semco's conduct in the marketplace had a direct effect on and in fact targeted Southwestern, causing it business loss through artificial impairment of its ability to compete.

Semco bid and thereafter received jobs for some nine months by exclusively using the wage benefit of production worker's rates.

At trial, Southwestern offered evidence of antitrust injury of exactly the type likely to be caused by the defendants' conspiracy. During the period of disparity, Southwestern attempted to compete with Semco on a large number of construction jobs. Almost immediately, although it had no knowledge of the production workers agreement or Semco's bidding advantage,

Southwestern experienced an unprecedented competitive disadvantage. Contemporaneously, Southwestern's business fortunes reflected its injury: it experienced extreme difficulty in obtaining bids; its sales staff reported a decline in bidding opportunities; its customers developed a perception that Southwestern was no longer competitive; its bidding success fell dramatically; and consequently its backlog of awarded bids dropped and was ultimately nearly eliminated.

Price is the major factor in determining bid awards, and Semco used a 20% lower wage rate to calculate its bids. When Semco bid with its exclusive union wage agreement, Southwestern's bids were some 20% higher than Semco's bids. Moreover, when Southwestern realized it was no longer competitive, it changed its bidding process to reduce its bids by substantially lowering and oftentimes eliminating any profit component.

Southwestern did receive construction jobs during the period of Semco's anticompetitive conduct. On these, it sustained injury because the bid was artificially deflated in response to Semco's unlawful advantage, and Southwestern thus lost profits on the jobs it received in the relevant time frame. Not surprisingly, once Southwestern finally obtained parity with Semco in September 1981, its success rate on bids, and consequently its backlog of bids, rose dramatically.

The evidence at trial showed that Southwestern's bids would have been lower than Semco's bids on a number of specific jobs had it not been for the wage discrepancy.

The record includes further evidence of injury in fact by way of expert testimony. An economist prepared an econometric model which established that Semco's unlawfully obtained composite wage rate drastically affected Southwestern's profits.

The jury heard and accepted the foregoing evidence at trial and made its finding that Southwestern had established injury

in fact. Pursuant to the jury verdict, the District Court entered judgment in favor of Southwestern.

The Fifth Circuit Court of Appeals reversed the District Court's judgment and overturned the jury's verdict on the sole ground that Southwestern had failed to sustain its burden of proving injury to its business or property under the antitrust laws. The Court of Appeals' holding ignores the voluminous above-recited evidence that Semco's and Mesa's conspiracy adversely affected Southwestern's bidding success. Further, the holding imposes an artificial standard of proof on a plaintiff in an antitrust case involving bidding. In the Fifth Circuit, such plaintiffs must present evidence in their case-in-chief of third party bidders on specific projects in order to establish injury; and further, such plaintiffs must disprove, or negative, the existence of third party bids on particular jobs that might have been lower than the plaintiff's bids. In short, this extraordinary decision imposes a burden on future antitrust plaintiffs of foreclosing all potential alternative or intervening sources of their injury to establish injury to their business or property under Section 4 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION IGNORES LONG-STANDING SUPREME COURT MANDATES SETTING A PRIVATE ANTITRUST PLAINTIFF'S BURDEN OF PROOF ON FACT OF INJURY.

A. Under Supreme Court precedent evidence establishing with a fair degree of certainty that a defendant's conduct was a material cause of a plaintiff's injury is sufficient proof of injury in fact.

Section 4 of the Clayton Act provides recovery for "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . .." 15

U.S.C. § 15(a) (1976). In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court stated the burden of proof of injury required of a private antitrust plaintiff:

> [I]n the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts [have] caused damage to the plaintiffs.'

Zenith, 395 U.S. at 123-24, *quoting Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). This Court reaffirmed in *Zenith* its longstanding precedent which recognizes the difficulties inherent to proving injury in fact, and a coincident causal nexus, and which therefore sets an alleviated injury burden on private antitrust plaintiffs. In the case at bar, as in most antitrust cases, the plaintiff cannot prove with precision what would have occurred had the defendants' anticompetitive conduct never existed. Neither can the plaintiff gain unlimited access to the data necessary to establish perfect causation. To prove causation more securely would require information from competitors and from an analysis of a variety of economic phenomena which are not susceptible of concrete proof.

This Court recently explained the rationale for the alleviated burden of proof on the private antitrust plaintiff. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Court reaffirmed its

> willingness to accept a degree of uncertainty in these cases [which] rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what

> plaintiff's situation would have been in the absence of the defendant's antitrust violation. But our willingness also rests on the principle . . . that it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted.

Truett, 451 U.S. at 566-67 (quoting *Hetzel v. Baltimore & Ohio Railroad Co.*, 169 U.S. 26, 39 (1898), and citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)).

B. Southwestern's trial evidence of injury fully met the Supreme Court standards of proof on an antitrust plaintiff.

As stated above, Southwestern's fact of injury was revealed by the variety of adverse consequences it suffered in 1981, both internally and in the marketplace. The Supreme Court's own decisions finding injury to antitrust plaintiffs establish the sufficiency of this evidence.

In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), the petitioner alleged injury from a competitor's attempts to preclude its entry into the pertinent market. The competitor respondents in that case had engaged in anticompetitive activities, including a price-cutting conspiracy, intended to exclude the petitioner from the marketplace. The appellate court had reversed a jury verdict for the petitioner on the ground that the petitioner had failed to prove that it would not have sustained losses in the absence of respondent's behavior, and concluded that the adverse impact on petitioner's business was the inevitable result of poor management and lack of sufficient capital. In reinstating the jury verdict, this Court admonished the court of appeals for improperly making factual assumptions contrary to the jury's finding:

> The court [of appeals] therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury.

Story Parchment, 282 U.S. at 566.

The opinion below is virtually indistinguishable in its substitution of judicial inferences for the jury's verdict. Southwestern offered evidence of Semco's wrongful conduct, a simultaneous loss of business, and declining profit values of exactly the type Semco's breach was likely to cause. The record evidence supports inferences that Southwestern would have won specific projects absent Semco's bidding advantage; that Southwestern received less profit because Semco's behavior compelled it to slash its bids to compete with Semco; and that Southwestern lost substantial business through the duration of Semco's exclusive wage agreement.

With its rejection of the jury's fact finding, the Fifth Circuit necessarily elevated this Court's formulation of the antitrust plaintiff's burden of proof by requiring Southwestern to foreclose alternative sources of its damage.

Two Supreme Court decisions since *Zenith* have addressed the fact of injury issue and demonstrate the impropriety of the Fifth Circuit's decision. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court established that recovery under Section 4 of the Clayton Act will obtain where plaintiff establishes injury of the type that the antitrust laws were intended to forestall. Semco's unlawful advantage in wages was coupled with an agreement to place Southwestern at a competitive disadvantage. Semco used the exclusive bidding advantage it secured to undercut its competitor, Southwestern, and to eliminate meaningful competition among the two com-

petitors in securing construction projects. As the *Story Parchment* decision mandates, this type of behavior is within the intended proscription of the antitrust laws.

In *Associated General Contractors of California, Inc. v. California State Council*, 459 U.S. 519 (1983), this Court set forth a number of factors to be considered in determining whether a private antitrust plaintiff has established injury. These criteria are as follows:

1) Whether the injury is of a type that the antitrust laws were intended to forestall;
2) Whether the injury is direct, i.e., whether the plaintiff is a consumer or competitor in the relevant marketplace;
3) Whether an identifiable class of persons other than plaintiff exist which are more appropriate parties;
4) Whether apportionment of damages is too speculative or complex to support an award.

Associated General Contractors, 459 U.S. at 537-46.

Southwestern has met the burden of proof pertaining to each of these factors. First, Semco's unlawful predatory behavior, which targeted and intended to impair the business of its only competitor in the Local's jurisdiction, produced an injury of exactly the type the antitrust laws were intended to forestall. *See Story Parchment*, 282 U.S. at 566. Second, Semco's unlawful agreement eliminating meaningful competition intentionally caused injury in fact to Southwestern, not only as Semco's direct competitor in the national marketplace, but as the only other spiral pipe and fittings manufacturer within the Local's jurisdiction. Indeed, there could be no class of potential plaintiffs more likely to act or more directly harmed by Semco's conduct.

Finally, Southwestern's evidence on fact of injury was unusually extensive relative to most antitrust cases. It illustrated injury in fact through both direct evidence and expert testimony. Southwestern offered an econometric model which evalu-

ated the impact of the conspiracy on Southwestern's business by eliminating from Semco's bids the value of the unlawful labor advantage. Southwestern's other evidence, referenced above, showed a tremendous and diverse impact to its profit margins on all bidding, to bidding opportunities, and to its bidding successes, when Semco bid using the secret union wage advantage. Conclusive evidence in the record showed specific construction projects for which both Southwestern and Semco bid, and showed that Southwestern's bids would have been lower than Semco's bids absent the latter's wage advantage. The record did not contain evidence that third parties would successfully have underbid Southwestern on all of these projects.

In short, Southwestern produced evidence more than sufficient to satisfy this Court's formulation of the private antitrust plaintiff's burden of injury proof.

C. The Fifth Circuit has ignored Supreme Court precedent in requiring Southwestern to foreclose alternative or intervening sources of its injury.

In overturning the district court's judgment and the jury's verdict in the instant case, the Fifth Circuit has ignored the longstanding body of Supreme Court precedent cited above, has misinterpreted the evidence adduced in the instant case, and has substituted its own factual inferences for that of the jury.

The Fifth Circuit reached its result by holding that a bidder who alleges antitrust violations must establish affirmatively, that is to an absolute certainty, that no other bidder could have received a specific bid as a predicate to recovery under Section 4. Without contradictory evidence from Semco, Southwestern's record did show specific construction contracts on which its bids were lower than Semco's, absent Semco's exclusive bidding advantage. The jury could and did reasonably infer that on competitive jobs, either (i) there were only two bidders

or (ii) only Southwestern's and Semco's bids were material to the award. Both inferences are permissible and each independently would support the finding that Southwestern's lower bid would have succeeded in the absence of the Defendants' wrongful conduct.

The jury's inferences are particularly reasonable in light of the entire record. Semco knew that courts theretofore had placed upon it, as defendant, the burden of disproving or rebutting Southwestern's evidence of causation. On certain projects, Semco attempted to suggest that third parties would have bid lower than Southwestern. It did not, however, convince the jury that such evidence applied to all affected projects, or that Southwestern would not have been the lowest bidder on each project. Therefore, if the jury is permitted to make reasonable inferences from the evidence submitted at trial, Southwestern satisfies even the outrageous burden advanced in the Fifth Circuit.

The Fifth Circuit's formulation of the injury requirement elevates a plaintiff's burden of proof far beyond that which the Supreme Court has formerly permitted. This Court's decisions are consistent in holding that a plaintiff who shows (as Southwestern has) that it sustained injury of the type likely to be caused by a defendant's anticompetitive behavior, has sustained its evidentiary burden. *See Story Parchment*, 282 U.S. at 561-66; *Zenith*, 395 U.S. at 124. The causal element need not be proved beyond showing its materiality with a fair degree of certainty. *Truett*, 451 U.S. at 566. No Supreme Court opinion has adopted the contrary requirement, now controlling in the Fifth Circuit, that an antitrust plaintiff foreclose other potential causes of its harm to prove injury under Section 4. *See Zenith*, 395 U.S. at 114 n.9.

In delivering its decision, the Fifth Circuit did not challenge the anticompetitive nature of the agreement and Semco's ensuing clandestine conduct. The Fifth Circuit ignored the weight of Southwestern's evidence, instead imposing a burden

of injury proof on Southwestern which goes beyond even that imposed on a personal injury plaintiff. Its decision flies in the face of the Supreme Court's allocation of antitrust evidentiary burdens, first established in *Truett*, that the burden of establishing an alternative cause of a plaintiff's injury, once a plaintiff has established injury to a fair degree of certainty, rests firmly on the defendant. *E.g.*, *Truett*, 451 U.S. at 566. Nevertheless, the Fifth Circuit has now made such proof part of a Clayton Act Section 4 plaintiff's *prima facie* case.

D. Conclusion.

Southwestern requests that this Court take this opportunity to realign the Fifth Circuit with the Supreme Court as to the allocation and level of proof of injury imposed in a private antitrust action. It is important for future Section 4 enforcement that private antitrust plaintiffs be given notice of their evidentiary burdens. By the decision announced below, a private antitrust plaintiff who reasonably relies on long established Supreme Court precedent may now be left without recompense in the Fifth Circuit, where he is confronted with an elevated burden of proof. In fact, such is exactly the case with Petitioner herein.

II.

CERTIORARI SHOULD BE GRANTED SO THIS COURT CAN FIRMLY SETTLE THE BURDEN OF AN ANTITRUST PLAINTIFF'S PROOF OF INJURY, WHICH IS CURRENTLY SUBJECT TO CONFLICTING INTERPRETATIONS AMONG THE CIRCUITS.

A. Certain lower courts have disregarded this Court's instructions on placement and level of proof of injury under Clayton Act Section 4.

In recent years a minority of the circuit courts has announced progressively escalating burdens of proof applicable

to a private antitrust claim. The Fifth Circuit signals in this case its location at the front of an increasingly strident movement to constrict the scope of private antitrust claims by elevating the plaintiff's burden of proof. Yet as this Court has recognized, the consequences of such developments are clear: elevation of an antitrust plaintiff's burden of proof results in a vast reduction in the number of plaintiffs able to establish a claim. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

The proof restrictions imposed by a minority of the circuit courts are particularly disruptive and discouraging to the justified antitrust complainant. These decisions ignore the inherent ambiguities of identifying the source of one's business injury. Natural fluctuations in the marketplace, or a plethora of other unidentifiable potential sources, could effect business damage. The existence of such possible causative factors is the very reason this Court requires an alleviated burden of proving fact of injury to sustain the essential effectiveness of the private action in enforcing the antitrust laws. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

The Supreme Court requirement that Southwestern show a causal nexus between the conduct of Semco and the Local's agent, and Southwestern's injury is a standard of proof Southwestern has satisfied. Its evidentiary burden of proving the fact of damage under Section 4 of the Clayton Act

> . . . is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.

Zenith, 395 U.S. at 114 n.9. (emphasis original) (citations omitted).

B. The clear majority of circuits apply the alleviated burden of injury proof provided in *Zenith* and its progeny.

Most of the circuit courts have remained firm in applying Supreme Court injury standards to antitrust cases. *See e.g., Danny Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209-10 (3d Cir. 1983); *Pierce v. Ramsey Winch Co.*, 753 F.2d 416 (8th Cir. 1985); *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467 (10th Cir.), *cert. denied*, 106 S.Ct. 77 (1985).

The Eleventh Circuit recently rendered a decision which illustrates the circuit majority's adherence to Supreme Court precedent. In *National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.*, 748 F.2d 602 (11th Cir. 1984), *cert. denied*, 106 S.Ct. 544 (1985), the plaintiff association of motion picture exhibitors sued eight major motion picture distributors under Section 4 of the Clayton Act, citing their attempts to prevent the plaintiff, a potential competitor, from entering the marketplace. In substance, the plaintiff's proof showed that the distributor defendants had interfered with plaintiff's efforts to generate revenues through on-screen advertising, and to enter the motion picture distribution market. The evidence showed that defendants threatened to boycott or otherwise penalize exhibitors who agreed to assist in the plaintiff's revenue-raising effort by penalizing those exhibitors who permitted on-screen advertising in general.

The district court granted summary judgment based on the defense contention that the plaintiff's injury was the result of alternative factors. Plaintiff's evidence showed that the defendants had offered financial incentives to exhibitors who shunned on-screen advertising, but did not show any instance in which the defendants had contacted an advertiser or discouraged an advertiser or exhibitor from on-screen advertising specifically related to plaintiff's efforts. Although the plaintiff did not specifically link its inability to enter the marketplace to defendant's unlawful conduct, the Eleventh Circuit followed *Zenith*

in reversing summary judgment. Its rationale is straightforward:

> [T]he law does not require an antitrust plaintiff to show that the defendant's wrongful action was the *sole* proximate cause of the injury sustained. The plaintiff need only prove, with a fair degree of certainty, that defendant's illegal conduct *materially contributed* to the injury.

National Independent Theatre, 748 F.2d at 607 (emphasis original) (citations omitted).

The Fifth Circuit's decision announced in this case is flatly inconsistent with the Eleventh Circuit's holding in *National Independent Theatre*. Southwestern's evidentiary support substantially exceeded that of the plaintiff in *National Independent Theatre* through Southwestern's proof of the impact of Semco's conduct on its business, profit margins, in-house bid orders and ability to compete effectively. Nevertheless, the Fifth Circuit held that record insufficient for not disproving other causes of lost bids.

The majority of the circuit courts are consistent with the Eleventh Circuit, and not the Fifth Circuit, in that they follow the Supreme Court's mandate of an alleviated antitrust burden of proof. The majority and Supreme Court view, moreover, mirror the traditional placement of the burden of proving that alternative causes contributed, in whole or in part, to a plaintiff's damage. This burden rests firmly with the defendants. *See e.g., Truett*, 451 U.S. at 566-67; *Klinger v. Baltimore & Ohio Railroad Co.*, 432 F.2d 506 (2d Cir. 1970); *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F.Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. International Business Machines Corp.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981). As stated above, the Supreme Court has recognized the vagaries of the marketplace and the ambiguities involved in proving causation with certainty. Therefore, once a plaintiff has established causal mis-

conduct, the defendant must carry the burden of proving that its wrongful activity did not cause the plaintiff's injury. *Truett*, 451 U.S. at 566-67.

C. The Ninth and Sixth Circuits, and assorted lower courts, have dramatically elevated and misallocated the private antitrust burden of injury proof.

In the late seventies the Sixth and Ninth Circuits rendered decisions that elevate the private antitrust plaintiff's burden of injury proof beyond the level set by the Supreme Court. In addition, scattered district courts have adopted other higher proof standards, reflecting increasing confusion among the courts.

In *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980) and 469 U.S. 1190 (1985), the Ninth Circuit adopted a stringent causation requirement for private antitrust plaintiffs. Under a misconception of *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Ninth Circuit introduced a new unrelated rule:

> According to *Brunswick*, plaintiff must show more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have 'flowed' from the wrong. To 'flow' from the wrong, *Brunswick* suggests, the loss must be 'the type of loss that the claimed violations . . . would be likely to cause'. (citation omitted). *To be one of several causes is not enough.*

Handgards, 601 F.2d at 997 (emphasis added).

Justice Kennedy, in his concurring opinion in *Handgards*, recognized that "[to] the extent this language suggests a change in the normal standards regarding causation in antitrust cases, the statement is unexplained. There is no need in this case to reexamine the rule that 'proximate cause' in antitrust cases is defined in terms of 'a substantial cause.'"

Handgards, 601 F.2d at 999 (Kennedy concurring). The decision ignored Supreme Court precedent, which does not require *plaintiffs* to weigh the relative contributions of various potential causes. *See Zenith*, 395 U.S. at 123-24. Plaintiffs must establish the causal link, but they need not negate or discount other causes. *Truett*, 451 U.S. at 566. Once a causal connection has been established, plaintiff has met its burden. *Bigelow v. R.K.O. Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931); *Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.*, 475 F. Supp. 973 (D. Mass. 1979).

One other circuit has taken the minority view of the Ninth Circuit as expressed in *Handgards*. In *Shreve Equipment, Inc. v. Clay Equipment Corp.*, 650 F.2d 101 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981), a panel of the Sixth Circuit declared that a plaintiff must not only prove that defendant's conduct was a material cause of its injury, it must prove that other potential causes were *not* the cause of its harm. *Shreve Equipment*, 650 F.2d at 105.

Contradictory circuit decisions have distorted this Court's holdings pronouncing fact of injury standards. A Pennsylvania district court opinion illustrates the resultant confusion. In *R.S.E., Inc. v. Pennsylvania Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa. 1981), a district court placed on the private antitrust plaintiff the burden of showing that its damage did not result from potential alternative factors, such as management problems, recession in the economy or lawful competition. *R.S.E.*, 523 F. Supp. at 964. This rule is a radical departure from prior standards applied in any case, and especially in antitrust cases.

D. The Fifth Circuit has now adopted a burden of injury proof even more repressive than that in the Sixth and Ninth Circuits.

The Fifth Circuit's decision in *Southwestern Sheet Metal Works, Inc. v. Semco Manufacturing, Inc.*, 788 F.2d 1144 (5th Cir. 1985), only increases the current confusion regarding judicial treatment confronting the private antitrust plaintiff. Indeed, the Fifth Circuit has now surpassed even the Ninth and Sixth Circuits in adding unprecedented proof requirements to the plaintiff's *prima facie* case. The Fifth Circuit required Southwestern to disprove alternative causes, to-wit, third party bids on specific bidding jobs. Although Semco and Mesa failed to introduce evidence of alternative causation, the Fifth Circuit Court of Appeals required Southwestern to prove in its case-in-chief that the defendants' unlawful conduct was the sole proximate cause of its injury. The requirement thus imposed further augments the inconsistency among the circuits in Section 4 cases.

The case now before the Court affords an opportunity to firmly settle this incoherency regarding "antitrust injury." Although this Court has recognized the difficulties of promulgating universal rules to govern Section 4 cases, *Associated General Contractors of California, Inc. v. California State Council*, 459 U.S. 519 (1983), lower courts have imposed just such benchmarks. Furthermore, they have set them at a level which is well nigh unattainable for an antitrust plaintiff. It is imperative that a private antitrust plaintiff have notice of the nature and level of proof he must proffer to support a jury finding of fact of injury. Currently, a plaintiff who reasonably relies on Supreme Court precedent, and consistent reiterations of that precedent, may nevertheless be doomed in any given circuit by an *ex post facto* elevation of his evidentiary burdens.

Bigelow and *Zenith* set the standard of proving material causation with a fair degree of certainty. Their holdings have never required antitrust plaintiffs to negate alternative or intervening potential causes. In the guise of imposing a "sub-

stantiality" requirement under the standard, the Ninth and Sixth Circuits have held that plaintiffs must weigh the relative merits of the various possible causes. *Handgards*, 601 F.2d at 997; *Shreve*, 650 F.2d at 105. The Fifth Circuit has now moved beyond even these courts, through its treatment of Southwestern's evidence, to require the plaintiff's foreclosure of all possible intervening causes of its injury.

The decision in the instant case underscores the dangers of continued inroads into the fora available to private attorneys general for enforcement of the antitrust laws. Such developments threaten to render private enforcement of the antitrust laws wholly ineffective.

E. Conclusion.

The pivotal inquiry in current private antitrust cases is the weight and allocation of burden of injury proof. Until recently, courts universally required a plaintiff to offer some evidence of causative injury in fact; the burden of disproving causation, or of proving a supervening causative factor, lay squarely with antitrust defendants. However, several circuits now adopt the view that a Section 4 plaintiff must bear the burden of disproving potential alternative, or intervening, sources of its injury to get to the jury. Inevitably, where summary judgment or review of a jury verdict is involved, the plaintiff that must foreclose alternative elements of causation loses.

The Fifth Circuit has misconstrued the antitrust plaintiff's burden of proof in two important respects. First, it requires a plaintiff to show more than the causal connection the Supreme Court has previously endorsed. Indeed, the circuit now requires a complete foreclosure of potential alternative sources of a Section 4 plaintiff's injury. Second, it misallocates the burden of proving alternative causation, placing it on the plaintiff rather than on the defendants.

The narrow issue presented herein affords the Court an opportunity to delineate and allocate the burden of proof as it deems proper. Southwestern urges this Court to settle this continuingly problematic rule so future antitrust plaintiffs may properly evaluate their claims.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S HOLDING THREATENS TO EVISCERATE PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS.

A. This Court has recognized the difficulties of proving causation with complete certainty, and has set the plaintiff's burden of injury proof under Section 4 accordingly.

This Court has long recognized the importance of the private plaintiff in the effective enforcement of the antitrust laws. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), *overr. on other grounds, Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969). In addition, this Court has often warned that too stringent a burden would pose particular problems that might eliminate private enforcement of the antitrust laws. *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). Consequently, this Court has consistently applied a rule that requires a private antitrust plaintiff to show evidence that illustrates causation only with a fair degree of certainty to support a just and reasonable inference of damage. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969). The reasoning for this rule is sound:

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the

> measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

Bigelow v. RKO Pictures, Inc., 327 U.S. 251, 264-65 (1946). The proof requirement set by the Fifth Circuit has conferred exactly this advantage on defendants.

B. The current developments in the Fifth Circuit threaten to leave the antitrust plaintiff without recourse.

Especially in the Fifth Circuit, there is nowhere for the private antitrust plaintiff to turn. In the case at bar, Southwestern offered evidence by way of expert testimony, through an econometric model that measured the impact of Semco's unlawfully secured advantage on Southwestern's profits. The Fifth Circuit itself previously sanctioned this approach in *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978):

> In the market preclusion context, to show causation a plaintiff must provide *some evidence it could have served the market absent the defendant's wrongful acts. The plaintiff need not document each sale lost.* It can, for example, rely on expert testimony concerning its ability to penetrate the market and to succeed in competition with those already there.

H&B Equipment, 577 F.2d at 247 (emphasis added).

Similarly, in the instant case, Southwestern offered evidence through the use of expert analysis showing that it would have been able, absent the Defendants' wrongful conduct, to secure construction projects, and therefore profits, over an expansive period of time. Notwithstanding Southwestern's reliance upon a method of proof previously applauded in the Fifth Circuit, the Circuit now holds that such a plaintiff must rely on a specific lost sale (or bid).

C. Once a plaintiff has shown a causal nexus between a defendant's conduct and the alleged injury, the burden of proving alternative causes or of disproving the causal relationship to the plaintiff should remain on the defendant.

Southwestern requests that the Court take the opportunity afforded by the facts of this case to reaffirm its prior holdings regarding a private antitrust plaintiff's burden of injury proof and in doing so to end the confusion demonstrated above among the circuit courts regarding these burdens. The Court has consistently held that a plaintiff must come forward with sufficient evidentiary support to permit an inference that the defendant's wrongful conduct was the cause of the plaintiff's injury. *Zenith*, 395 U.S. at 114 n.9. Traditionally, evidence that plaintiff suffered injury likely to be caused by defendant's conduct or that defendant's conduct was a material cause of a plaintiff's injury was sufficient. *Bigelow*, 327 U.S. at 264. Now, however, in at least three circuits, a plaintiff must prove not only that defendant's conduct was a cause of his injury, he must foreclose other possible causes of his injury.

Under the Fifth Circuit's holding very few plaintiffs will be able to shoulder the newly created burden of proving a negative proposition: that no other sources of its damage exist. Southwestern, if forced to reconstruct the bidding on construction jobs during the period of Semco's anticompetitive conduct, would either have to approach each solicitor of bids individually, or reconstruct records by securing information on bidding from competitors. Either approach sets an onerous and unprecedented task, offering results too uncertain to impose uniformly on antitrust plaintiffs. As in the typical antitrust case, proof of perfect causation involves market inquiries and economic analyses which are not susceptible of concrete determination.

Traditionally the antitrust plaintiff is subject to a lesser burden of proof than other claimants to account for the marketplace influences which render certainty a virtual impossibility.[1] Hence, to require the antitrust plaintiff to foreclose possible sources of causation may actually result in eliminating his cause of action in the most clearly violative circumstances. The more complicated and clandestine the defendant's conduct, the more likely the plaintiff will be unable to access information sufficient to sustain such a burden of proof.

D. Conclusion.

To elevate a plaintiff's burden of proof beyond establishing the causal nexus this Court has formerly required threatens to gradually but firmly reduce and finally eliminate the private cause of action in a large number of antitrust cases. Therefore, Southwestern requests that this Court now clarify a private antitrust plaintiff's burden of injury proof so future plaintiffs may know their burdens and may sustain them where justified.

---

[1]The common law rule in tort cases, for example, does not require a plaintiff to pinpoint causation among a forest of potential alternatives. The tort plaintiff need not prove that the defendant was the sole cause of his injuries. *In re Air Crash Disaster Near New Orleans, La. on July 19, 1982,* 764 F.2d 1084 (5th Cir. 1985); *Skinner v. Stone, Raskin & Israel,* 724 F.2d 264 (2d Cir. 1983) (where several proximate causes exist injury in fact may be attributed to any one). Products liability cases are a useful analogy to the antitrust genre, because both actions require alleviated proof standards to sustain effective enforcement. In such cases, a plaintiff must establish a clear causal nexus between its harm and defendant's conduct, but the burden of proving that injury is attributable to alternative causes rests on defendants, for their wrong has created the problematic uncertainty. *Coursen v. A. H. Robins Co.,* 764 F.2d 1329, 1338 (9th Cir.), *corrected,* 773 F.2d 1049 (9th Cir. 1985); *Sindell v. Abbott Laboratories,* 607 P.2d 924 (Cal.), *cert. denied,* 449 U.S. 912 (1980).

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1986

86-828
No. _____

IN THE

Supreme Court of the United States

October Term, 1987

Southwestern Sheet Metal Works, Inc.,
Petitioner,

v.

Semco Manufacturing, Inc.,
Respondent.

Appendix to

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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November, 1986

No. _____

IN THE

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October Term, 1987

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v.

Semco Manufacturing, Inc.,

Respondent.

Index to Petitioner's Appendix

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 85-1001

D. C. Docket No. EP-81-CA-228

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

versus

SEMCO MFG., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before GEE and GARWOOD, Circuit Judges, and BOYLE*, District Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause is reversed, and

* District Judge of the Eastern District of Louisiana, sitting by designation.

the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 5, 1986

ISSUED AS MANDATE: SEP 8 1986

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85 1001

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

versus

SEMCO MFG., INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion May 5, 5 Cir., 1986, ___F.2d____)

(August 25, 1986)

Before GEE and GARWOOD, Circuit Judges, and BOYLE, District Judge.*

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Thomas Gibbs Gee

United States Circuit Judge REHG-8

*District Judge for the Eastern District of Louisiana, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff-Appellee,

v.

SEMCO MFG., INC.,

Defendant-Appellant.

NO. 85-1001
OPINION

Filed May 5, 1986

Before: Thomas Gibbs Gee and Will Garwood, Circuit Judges, and Edward J. Boyle, District Judge.*

Opinion by Judge Thomas Gibbs Gee

Appeal from the United States District Court
for the Western District of Texas
Lucius D. Bunton, III, District Judge, Presiding

SUMMARY

Antitrust

Appeal from a district court judgment based on a finding that defendants had conspired to restrain competition causing injury to plaintiff's business. Reversed and remanded.

Southwestern Sheet Metal Works, Inc. (Southwestern) and Semco Mfg., Inc. (Semco) both manufacture pipe and fittings used in air conditioning duct systems. Southwestern had a manufacturing facility in El Paso, Texas, when Semco moved into the area. Before Semco made the move, however, its president and a local union's business manager negotiated a pre-hire agreement that granted Semco more favorable worker ratios than competitors in the area, including Southwestern. Southwestern thereafter filed suit in district court alleging that Semco and the

*Edward J. Boyle, United States District Judge for the Eastern District of Louisiana, sitting by designation.

union manager had conspired to give Semco labor terms that would put Semco at a bidding advantage over its competitors. The alleged fact of injury included profits from the projects that Southwestern lost because Semco underbid it. Southwestern calculated the amount of damages using time-series data in an econometric model that predicted the effect on its profits of a disparity in wage rates. The jury relied on this estimation procedure to find actual damages of $205,952. On appeal, Semco contends that the district court erred in denying Semco's motion for a directed verdict because Southwestern allegedly failed to prove the fact of injury.

[1] To obtain damages for an antitrust violation, a plaintiff must establish, among other things, the fact of injury: that is, the plaintiff must establish that a violation proximately caused injury to his business. [2] The fact of injury Southwestern claims to have established includes the foregone profits from bids it lost to Semco because Semco used a lower composite wage in determining its bids and, on bids Southwestern did win, the lower profits it realized due to the lower markup it could use when competing with Semco. [3] Based on an economic model, Southwestern's expert witness testified that with the wage advantage, Semco almost uniformly had a lower bid than Southwestern, and that without the advantage, Semco would have placed some bids that would have been higher than Southwestern's. [4] However, even if that economic analysis were accepted, the expert could not conclude that Southwestern would have received any particular bid. There is nothing in the record to indicate that of all bids submitted, Southwestern would have won a bid but for Semco's advantage; Southwestern's proof completely ignores all other bidders. [5] Nor is there evidence that Semco's wage advantage exerted such influence on other competitors' bidding that Southwestern had reduced profits. In short, Southwestern's evidence calls for speculation, and the district court therefore erred in denying Semco's motion for a directed verdict.

OPINION

THOMAS GIBBS GEE, Circuit Judge:

This is an antitrust case involving one firm's claim that a new-entrant competitor and a union's business manager

combined or conspired to restrain competition in violation of Sherman §1[1]. Defendant Semco Mfg., Inc. ("Semco") appeals from a final judgment entered for plaintiff-appellee Southwestern Sheet Metal Works, Inc. ("Southwestern"). We reverse.

I.

Southwestern and Semco both manufacture spiral pipe and fittings used in air conditioning duct systems. Before and during 1981, Southwestern had a manufacturing facility in El Paso, Texas. In 1980, Semco, which had plants in Missouri and Virginia, was considering the El Paso area as a site for a new plant. To that end, Semco's president and Henry Mesa ("Mesa")[2] negotiated a pre-hire union agreement in October 1980. The relevant provisions of that agreement granted Semco more favorable worker ratios than competitors in the El Paso area enjoyed. Specifically, on products receiving union labels other firms had to employ 3 journeymen, 1 apprentice, and no production workers. Under the terms of the October 1980 agreement, Semco could have 3 journeymen, 1 apprentice, and 3 production workers. Because production worker wages were less than those of journeymen and apprentices, this had effect to reduce Semco's average composite wage rate for products it sold in competition with Southwestern.

Southwestern learned the terms of the October 1980 agreement in mid-May 1981. Southwestern's contract with the Union expired on June 30, 1981 and, having learned the terms of the Semco agreement, Southwestern demanded parity in any new agreement. Briggs, who replaced Mesa after Local 188 merged with Local 49 in April 1981, refused to give parity by extending the Semco terms to Southwestern, but tried to give Southwestern parity by cancelling the Semco agreement.

---

[1] 15 U.S. C. §1

[2] At that time, Mesa, a co-defendant in this action, was the business manager for Local 188 of the Sheet Metal Workers International Association. In April 1981, Local 188 merged into Local 49 from Albuquerque. After the merger, Mesa was charged with mishandling Union funds and impropriety in connection with the Semco agreement. After a hearing before the executive board of Local 49, Mesa was expelled from the Union. Mesa is not before the Court in today's appeal.

Claiming that it was threatened with having the Union pull out if if did not concede before its contract expired, Southwestern signed a standard form agreement under protest. The disparity in employment and wage requirements was later resolved when Semco and the Union signed a revised contract.

In its complaint, Southwestern alleged that Semco and Mesa conspired to give Semco labor terms that would put Semco at a bidding advantage over its competitors. The alleged fact of injury included profits from the projects Southwestern lost because Semco underbid it. Southwestern calculated the amount of damages using time-series data in an econometric model that predicted the effect on its profits of a disparity in wage rate. The jury relied on this estimation procedure to find actual damages of $205,952.

On appeal, Semco contends that the trial court erred (1) in submitting the antitrust conspiracy issue to the jury; (2) in denying Semco's motion for a directed verdict based on Southwestern's alleged failure to prove the fact of damage; (3) in refusing to submit the labor exemption issue to the jury; (4) in submitting the damage issue to the jury; and (5) in admitting evidence that the Union tried and convicted Mesa of embezzlement and improper conduct. Because the fact of damage issue is dispositive here, we limit our review to it.

II.

[1] Semco contends that the district court erred in refusing to grant its motion for a directed verdict based on Southwestern's alleged failure to establish fact of injury. As we held in *M.C. Manufacturing Co., Inc.,v. Texas Foundries, Inc.*,517 F.2d 1059, 1063-64 (5th Cir. 1975), *cert. denied*,424 U.S. 968 (1976), to obtain damages for an antitrust violation, a plaintiff must establish, among other things, the fact of injury: that is, the plaintiff must "establish that such violation proximately caused injury to his business...." The standard of review controlling our analysis here is whether, viewing the evidence in the most favorable light and with all reasonable inferences drawn most favorably to it, Southwestern produced substantial evidence of injury caused by the alleged violation so that "reasonable and fair-minded men in the exercise of

impartial judgment might reach different conclusions...." *Boeing Co. v Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

[2] The fact of injury Southwestern claims to have established includes the foregone profits from bids it lost to Semco because Semco used a lower composite wage in determining its bids and, on bids Southwestern did win, the lower profits it realized due to the lower markup it could use when competing with Semco. Southwestern attempted to prove the fact of damage primarily through the testimony of an expert economic witness; other evidence came from a former Semco employee, the business manager for Local 49, Southwestern officers, and Southwestern sales slips and records.

[3] Southwestern's expert economist, Roth, undertook a two-part analysis in his fact-of-injury inquiry. As a first step, he developed a model explaining variation in Semco's bid price for, among other periods, October 1980 through August 1981. The independent variables in the model, those hypothesized to explain variation in bids, were the average composite wage, the materials used, and total construction activity. The observations were all Semco bids from its Sunland Park, New Mexico, facility for the period January 1981 through August 1981. From this analysis, Roth determined that his model explained 89.47 percent of all variation in Semco bids. Moreover, Roth determined that the probability that the relationship between the composite wage rate and bids was random was less than 20 percent. Based on these results, Roth failed to reject his hypothesis that there was a systematic relationship between average composite wage and Semco bids. The second step in Roth's analysis involved comparing the bids Semco would have placed had it not had the wage advantage with bids Southwestern placed. To do this, Roth had to estimate the bid Semco would have placed but for the lower wage. He did this by multiplying Semco's actual bid by the product of the elasticity coefficient on the average composite wage variable he had estimated in the first-step model and the percentage difference between Semco's and Southwestern's average composite wage rate. He then compared the estimated Semco bids with corresponding Southwestern bids. Whereas with the wage advantage Semco almost uniformly had a lower bid than Southwestern, without the wage advantage

Semco would have placed some bids that would have been higher than Southwestern's. From this, Roth concluded that Semco's comparative advantage derived from the lower wage affected the competitive environment in the industry and, because it was a competitor, affected Southwestern as well. Absent the wage advantage, Southwestern would have competed more successfully in bidding for projects.

[4] With respect to this economic analysis, Semco argues that, regardless of what Roth may have accomplished, he did not present sufficient evidence of fact of injury. Even if the adjusted Semco bid would have exceeded Southwestern's bid, Roth could not conclude that Southwestern would have received the bid. Besides being less than persuaded by the statistical significance of Roth's estimation results, we agree with Semco's argument. We find nothing in the record to indicate that of all bids submitted, Southwestern would have won the bid but for Semco's wage advantage. Southwestern's proof completely ignores *all other bidders.*

The other evidence that Southwestern points to as establishing the fact of injury likewise falls short. Donald Linss, a Semco budget analyst and controller during the relevant period, testified that Semco relied on the favorable wage rate in calculating bids from the Sunland, New Mexico facility. Semco points out, however, that Linss also testified that Semco did not use production workers in manufacturing spiral duct and fittings and that the favorable wage was therefore not a component in bids on these products. Southwestern next contends that Gary Briggs, the business manager for Local 49, testified about the chaos the Semco agreement was creating in the industry. The record shows that, although Briggs did refer to industry chaos, this had nothing to do with bidding. Instead, the chaos referred to resulted from other firms increasingly demanding the same labor terms from the Union as Semco had gotten. Southwestern finally argues that its officers, Charles Cooper and Jay Washbourne, testified that, during the period when Semco had the wage advantage, Southwestern was not a competitive bidder. We find nothing in Cooper's testimony to support a finding of fact of injury. Nor does Washbourne's testimony reveal that Southwestern lost or was likely to have lost any specific bids to Semco.

Washbourne's testimony suggests only that Semco and Southwestern bid on some of the same projects during the relevant period, some of which Semco won and other of which Southwestern or a third party won; that Southwestern's bids during this period were 10 to 15 percent higher than some winning bids, a situation that changed after Semco lost its wage advantage; and that, by Washbourne's calculations, Semco had to have a wage advantage in its bids if it were to make any profits on the bids it was submitting.

[5] At most, Southwestern's evidence of fact of injury suggests that something happened to Southwestern's profitability during 1981, that Semco was a competitor, and that Semco had an advantageous labor agreement. Not one instance is presented where, but for Semco's wage advantage, Southwestern would have won or was likely to have won. Nor is there evidence that Semco's wage advantage exerted such an influence on other competitors' bidding that Southwestern had reduced profits. Southwestern did not present sufficient evidence to lead reasonable and fair-minded jurors to reach different conclusions; its evidence calls for speculation. The district court therefore erred in denying Semco's motion for a directed verdict.

III.

The district court order granting judgment to Southwestern is REVERSED. This cause is REMANDED with instructions to enter an order of judgment for Semco.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC., Plaintiff	
V.	NO. EP-81-CA-228
SEMCO MANUFACTURING, INC. and HENRY V. MESA, Defendants	

JUDGMENT

The above-captioned cause came on for trial before the court and a jury on August 20, 1984 in the El Paso Division of this Court, and, the issues having been tried and the jury having rendered a verdict in favor of the plaintiff in the amount of $205,952.00 as actual damages, the Court enters its Judgment as follows:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff SOUTHWESTERN SHEET METAL WORKS, INC. do have and recover from defendants SEMCO MANUFACTURING, INC. and HENRY V. MESA the sum of $618,856.00, representing treble damages as provided by law, for which sum the defendants are jointly and severally liable.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff SOUTHWESTERN SHEET METAL WORKS, INC. do have and recover from defendants SEMCO MANUFACTURING, INC. and HENRY V. MESA the sum of

$305,219.25 representing reasonable attorney's fees in the prosecution through trial of this cause, for which sum the defendants are jointly and severally liable.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the event of an appeal to the United States Court of Appeals for the Fifth Circuit, plaintiff be awarded an additional sum of $50, 000.00 representing reasonable attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that, in the event of an appeal to the United States Supreme Court, plaintiff be awarded an additional $25,000.00 as reasonable attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff do have and recover from defendants the sum of $76,854.00 representing reasonable and necessary expenses and costs incurred in the prosecution of this action, for which sum the defendants are jointly and severally liable.

SIGNED and ENTERED this the 7th day of November, 1984.

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC., Plaintiff	
V.	NO. EP-81-CA-228
SEMCO MANUFACTURING, INC. and HENRY V. MESA, Defendants	

ORDER

On this date came on to be considered defendants' motion for Judgment notwithstanding the verdict or, in the alternative, for a new trial. While said motions, and the briefs in support thereof, made for extremely fine reading, the Court declines the invitation of defendants to either disturb the jury verdict, or, set the case for a new trial. Accordingly,

IT IS, THEREFORE, ORDERED that defendants' motion for Judgment notwithstanding the verdict, or, in the alternative, for a new trial be and is hereby DENIED.

SIGNED and ENTERED this the 26th day of November, 1984.

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

SOUTHWESTERN SHEET METAL WORKS, INC.,

Plaintiff,

v. NO. EP-81-CA-228

SEMCO MFG, INC., and HENRY MESA

Defendants

VERDICT FORM

Answer all the following questions from a preponderance of the evidence.

1. Do you find from a preponderance of the evidence that SEMCO and MESA entered into a contract, combination or conspiracy to extend to SEMCO uniquely favorable labor and wage terms and conditions that were not available to the plaintiff, and to thereby place the plaintiff at competitive disadvantage in the spiral pipe and fittings business?

ANSWER: Yes or No.

WE ANSWER: YES

If you have answered question number 1 yes, and only if your have so answered, continue to question number 2.

2. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, was an unreasonable restraint of trade under the standards given you by the Court in its instruction?

ANSWER: Yes or No.

WE ANSWER: YES

If you have answered question number 2 yes, and only if you have so answered, continue to question number 3.

3. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, constituted a restraint on interstate commerce involving a substantial amount of such commerce?

ANSWER: Yes or No.

WE ANSWER: YES

4. Do you find from a preponderance of the evidence that such contract, combination or conspiracy, if any, proximately caused injury to SOUTHWESTERN in its business or property?

ANSWER: Yes or No.

WE ANSWER: YES

DECEMBER 2, 1983
date

John W. Rice
FOREPERSON

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

EL PASO DIVISION

SOUTHWESTERN SHEET METAL
WORKS, INC.

VS. NO. EP-81-CA-228

SEMCO MFG., INC.
and HENRY MESA

VERDICT FORM

ANSWER THE FOLLOWING QUESTION FROM A PREPONDERANCE OF THE EVIDENCE.

WHAT AMOUNT OF MONEY, IF ANY, DO YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE FULLY AND FAIRLY COMPENSATES PLAINTIFF FOR ITS DAMAGES THAT WERE PROXIMATELY CAUSED BY DEFENDANTS' VIOLATION OF THE ANTITRUST LAWS?

ANSWER IN DOLLARS AND CENTS, OR NONE.

ANSWER: $205,952.00

JOHN RICE, FOREMAN

AUGUST 23, 1984
DATE

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 15 - COMMERCE AND TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

THE CODE OF THE LAWS
OF THE
UNITED STATES OF AMERICA
TITLE 15 - COMMERCE AND TRADE

§15. Suits by persons injured

(a) Amount of recovery; prejudgment interest. Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking

in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party ,or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states. (1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any

claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions. For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and (2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

No. 86-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHWESTERN SHEET METAL WORKS, INC.
Petitioner,

v.

SEMCO MANUFACTURING, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 13, 1987

QUESTIONS PRESENTED

1. Whether a manufacturer which negotiates a more favorable labor contract with a union than a competitor and who submits lower bids on some jobs than the competitor is liable in damages, where the competitor proves that his profits declined during the time the contract was in effect but does not offer any evidence that but for the alleged violation of the antitrust laws there would not have been a reduction in profits.

2. Whether the opinion of the Fifth Circuit Court of Appeals correctly holds that in order to establish the fact of damage in an antitrust case the plaintiff must prove that the alleged violation of the antitrust laws by the defendant was a material cause of his injury.

LIST OF PARTIES AND OTHER INTERESTED PERSONS

The parties to the proceedings below were the Petitioner, Southwestern Sheet Metal Works, Inc., the Respondent, Semco Manufacturing, Inc., and Henry V. Mesa. Mesa, co-defendant in the district court, was not a party to the Fifth Circuit appeal, and is not before the Court as a party to these proceedings.

The following persons and entities not listed in the caption have an interest in the outcome of these proceedings. These representations are made for purposes of consideration in evaluating possible disqualification or recusal.

Henry V. Mesa, Defendant (Non-Appealing).

Limbach Incorporated, Parent of Semco Manufacturing, Inc.

Sheet Metal Workers International Association.

Local 49 of the Sheet Metal Workers International Association, Successor to Local 188.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Semco Mfg., Inc., Respondent, submits this Brief in Opposition to the Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit filed by Southwestern Sheet Metal Works, Inc., Petitioner. Respondent respectfully requests that the Court deny the Petition because the opinion of the Fifth Circuit, reported at 788 F.2d 1144 (5th Cir. 1986), correctly states the burden of proof which a plaintiff must meet in a private antitrust action to establish the fact of damage or injury in fact. The Petition also should be denied because the judgment of the court below is right and because the Respondent did not offer evidence sufficient to prove the fact of damage in accordance with the standards set out in the applicable decisions of the Court.

Petitioner and Respondent are sometimes referred to as "Southwestern" and "Semco," respectively.

STATEMENT OF THE CASE

Semco is a subsidiary of Limbach Incorporated, a company engaged in construction and other businesses. Semco manufactures products for the heating and air conditioning industry. Semco opened a new plant in Sunland Park, New Mexico, near El Paso, Texas, and negotiated a labor agreement in October 1980 with Local 188 of the Sheet Metal Workers' International Association in El Paso, acting through its Business Manager, Henry Mesa. Semco and Mesa are the defendants and alleged co-conspirators.

Southwestern, located in El Paso, competes with Semco in the manufacture of spiral pipe and fittings. During the time in question Southwestern also had a labor agreement with Local 188, effective July 1, 1979, which did not terminate until June 30, 1981. Southwestern's complaint is that Semco's October 1980 agreement with the Local afforded it an advantage in bidding for jobs because it permitted the use of "production workers," who are paid less than "journeymen" or "apprentices," while Southwestern's agreement in effect at the time, unlike its earlier agreement, did not contain such a provision. According to Southwestern, Semco thus was enabled in some instances to submit lower bids, which resulted in a decline in Southwestern's sales and profits.

Southwestern, with knowledge of the Semco October 1980 agreement, negotiated a new labor agreement with the Local, effective July 1, 1981, upon the expiration of its 1979 agreement. The new Southwestern agreement, however, negotiated with Mesa's successor who was not a member of

the alleged conspiracy, did not contain a provision permitting the use of production workers. In September 1981 Southwestern negotiated a third agreement, replacing the July 1, 1981 agreement, which did contain a production worker provision.

Southwestern offered evidence that its sales and profits declined during the time that the Semco October 1980 agreement was in effect. Through an expert witness it also offered opinion evidence that it would have been able to submit lower bids on some jobs which it bid against Semco if it had a labor agreement permitting the use of production workers. However, it did not offer evidence that it would have been the successful bidder on any job on which its bid, as recalculated by its expert witness assuming the use of production workers, would have been lower than that submitted by Semco. Other companies in competition with Semco and Southwestern, including but not limited to United-McGill Corporation, which had opened a new plant in Hillsboro, Texas, in 1980, also submitted competitive bids and were awarded contracts on jobs which were bid by both Semco and Southwestern. United-McGill's labor agreement allowed the use of lower paid workers classified as "specialists" and its composite wage rate was lower than that of Semco.

During the time in question Southwestern made management changes, purchased new equipment, instituted new production procedures and changed the manner in which it estimated jobs. Southwestern admitted that these factors affected its profits.

Typically Semco and Southwestern submitted their bids to contractors, who purchased components and supplies from them and from other manufacturers and suppliers

which were then "packaged" by the contractor in a single bid for a contract to do the heating or air conditioning work on a construction project. If the contractor, whose bid price was based on the bids submitted to him by Semco, Southwestern and others for components of the total bid package, was successful in obtaining the contract, then their bids might be accepted if they were the lowest bidder.

There was evidence that Semco and Southwestern sometimes bid on only part of the work available for bidding. However, Southwestern's expert witness admitted that he did not examine the bids submitted by Semco and Southwestern on any job to determine whether they actually had bid on the same scope of work. Therefore he was unable to say whether the bids of Southwestern which he had hypothetically adjusted were in fact comparable.

Southwestern brought its claim against Semco and Mesa as an action under the antitrust laws on the theory that the October 1980 agreement between Semco and the union was an unreasonable restraint of trade which caused it injury.

REASONS FOR DENYING THE WRIT

I. *Petitioner Has Incorrectly Stated The Burden of Proof of The Fact of Damage*

Petitioner has incorrectly stated the standard of proof necessary to establish the fact of damage, or injury in fact, by failing to distinguish between an antitrust plaintiff's burden of proof of the fact of damage and his burden in proving the amount of damages. The burden of proof necessary to establish fact of damage is significantly different than that for the amount of damages. *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555, 562 (1931). The term "fact of damage" can be likened to the

causation element in a negligence cause of action. *State of Alabama v. Blue Bird Body Company, Inc.*, 573 F.2d 309, 317 (5th Cir. 1978). It simply means that the plaintiff must prove that the antitrust violation caused injury to him. *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969). Although he need not prove that it was the sole cause of his alleged injury, he must show that the violation was a material cause. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, n.9 (1969). This showing may not be based upon speculation. Rather, the causal link must be proved as a matter of fact and with a fair degree of certainty. Mere proof of a violation of the antitrust laws and proof that the plaintiff has suffered some damages is insufficient to prove a cause of action under the antitrust laws, since such proof establishes only that injury *may* have, not that it *did*, result from the violation. *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977).

On the other hand, once the fact of damage has been proved, the amount of the plaintiff's damages caused by the defendant's violation may be established under a more lenient burden of proof. As the Court has said, the rule which precludes the recovery of uncertain damages applies to those damages which "are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment*, 282 U.S. at 562. While the jury may not render a verdict based on speculation or guesswork, it may make a just and reasonable estimate of the amount of damage based on relevant data and render its verdict accordingly, relying on probable and inferential as well as upon direct and positive proof. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

The distinction between fact of damage and the amount of damages is crucial. Difficulty of ascertainment is not to be confused with right of recovery, which depends upon proof of causation. If the damage is certain, the fact that its extent is uncertain does not prevent a recovery. *Story Parchment,* 282 U.S. at 566. It is precisely this distinction which the Petition obscures. Petitioner takes the position that a plaintiff need prove only a violation of the antitrust laws by the defendant and that he suffered injury of "the type likely to be caused" by the violation. (Petition at 3, 22). Principal reliance is placed on *Zenith Radio, Bigelow, Story Parchment* and *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* 451 U.S. 557 (1981). However, both *Bigelow* and *Story Parchment* are amount of damage rather than fact of damage cases, and that part of the Court's opinion in *Zenith* which has been quoted by Petitioner (Petition at 3) also relates to the burden of proving the amount of damages rather than the fact of damage, as indicated both by its context and the citation of *Bigelow, Story Parchment* and *Eastman Kodak Company v. Southern Photo Materials Company,* 273 U.S. 359, 377-379 (1927), as supporting authority.

Petitioner's reliance on *J. Truett Payne* is equally misplaced. Although some of the language in the opinion may seem to relate in a general way to proof of the fact of damage, the only question presented in that case, as noted in the first paragraph of the opinion, was "the appropriate measure of damages in a suit brought under §2(a) of the Clayton Act, as amended by the Robinson-Patman Act." *J. Truett Payne,* 451 U.S. at 559. Furthermore, its applicability to the case at bar, which arises under §1 of the Sherman Act, is all the more questionable since, unlike the Sherman Act, §2(a) of the Robinson-Patman Act "is violated merely upon a

showing that the effect of such (price) discrimination *may be* substantially to lessen competition." *Id.* at 561. (Emphasis by the Court).

What the opinions relied upon by Petitioner have to say, therefore, concerning an alleviated burden of proof on private antitrust plaintiffs relates only to the burden of proving the amount of damages and not to the proof required to establish the fact of damage or causation. By contrast, the questions presented in this case relate solely to the burden of proving the fact of damage. The issue of the burden of proof as to the amount of damages was not the basis of the decision by the court below, was not discussed in the opinion and is not before the Court.

This fundamental misreading of the law underlies all of the reasons advanced for granting the writ and is fatal to Petitioner's position. However, as hereinafter noted, a writ of certiorari should not be granted in this case, assuming that the Petitioner is right in its view on the burden of proof issue, because the judgment of the court below is correct, even if the reasons set forth in the court's opinion are wrong. Further, Petitioner misreads and misconstrues the Fifth Circuit's opinion. In actual fact the court only reaffirms the settled rule that the antitrust violation must be shown to have caused injury to the plaintiff before he is entitled to recover damages.

II. *Petitioner's Evidence Did Not Meet The Burden of Proof Required To Establish Fact of Damage*

Petitioner contends that it "offered evidence of Semco's wrongful conduct, a simultaneous loss of business, and declining profit values of exactly the type Semco's breach was likely to cause" and that its evidence "supports inferences that Southwestern would have won specific projects

absent Semco's bidding advantage; that Southwestern received less profit because Semco's behavior compelled it to slash its bids to compete with Semco; and that Southwestern lost substantial business through the duration of Semco's exclusive wage agreement." (Petition at 8). It contends that such evidence, without more, is sufficient to establish the fact of damage. Assuming for the sake of argument that this is an accurate characterization of the evidence, it still fails to meet the required burden of proof.

In support of its position Petitioner cites *Story Parchment.* As previously noted, however, that case dealt solely with the proof necessary to establish the amount of damages once an antitrust plaintiff has met his burden of proving injury in fact. As the Court observed, "... there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment,* 282 U.S. at 562.

The quotation from *Story Parchment* (Petition at 8) not only is lifted out of context in an effort to make it appear that the Court is addressing proof of fact of damage, a key phrase ("in any measurable degree") is ignored. At this point in the opinion the Court was discussing the "second item of damages," which was the alleged depreciation in the value of the plaintiff's plant caused by the antitrust violation. The court below had held that the depreciation in value of the plaintiff's plant had not been proved to be due "in any measurable degree" to any violation of the Sherman Act by respondents. The only question presented was whether the evidence was sufficiently certain to support the verdict of the jury as to the amount of such damage. The Court said:

> "That there was actual damage due to depreciation in value was not a matter of speculation, but a fact which could not be gainsaid. The amount alone was in doubt, and, in the light of the foregoing discussion as to the first item of damages, the proof is sufficiently certain and definite to support the verdict of the jury in that respect." *Story Parchment,* 282 U.S. at 567.

It is submitted that *Story Parchment* provides no support for the position that the evidence described in the Petition meets the burden of proof as to the fact of damage. All that the Court held was that such evidence satisfied the required burden for proving the amount of damages.

Petitioner also relies on *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.* If anything such reliance is even more misplaced than the citation of *Story Parchment* as authority for the Petitioner's position. In *Brunswick* the Court did not address causation or fact of damage, which was assumed. The sole question presented was whether the damages alleged constituted "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489 (Emphasis by the Court). The Court held that an antitrust plaintiff in order to recover treble damages must prove more than injury causally linked to the antitrust violation. The proof must show the type of injury that the antitrust laws were intended to prevent. *Brunswick* affords no support to Petitioner because it does not address — indeed it assumes — fact of damage. Thus *Brunswick* assumes the very fact in issue here.

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) is equally inapposite. The plaintiffs in that case alleged violations of the antitrust laws and claimed that such "violations caused them $25 million in damages." *Associated General*

Contractors, Id. at 523-524. Since the complaint had been dismissed by the district court, the Court had to assume that the plaintiff could prove the facts alleged. *Id.* at 526. Having assumed fact of damage, the sole issue presented here, the Court held that no damages could be recovered because "allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law." *Id.* at 545. *Associated General Contractors* has no more to do with the questions presented in the case at bar than does *Brunswick.* That damages may be recovered if the injury is of the type that the antitrust laws were intended to prevent does not relieve the plaintiff of the necessity to prove the fact of damage. The requirement of "antitrust injury" is simply an additional element which may defeat recovery even though the plaintiff has proved a violation of the antitrust laws and a causal link between such violation and his injury or damages. It does not support the Petitioner's claim that his evidence satisfied the burden of proof required to establish the fact of damage because his injury was the type that the antitrust laws were intended to prevent — thereby leap-frogging the requirement that the evidence must establish a causal link between the violation and the injury.

III. *Petitioner Has Misconstrued The Opinion of The Court of Appeals*

At the heart of the Petitioner's reasons why a writ of certiorari should be granted is the argument that the opinion of the Fifth Circuit constitutes a radical departure from the Court's instructions on placement and level of proof of the fact of damage in private antitrust actions (Petition at 12). This is a fundamental misreading of the opinion below,

which only reaffirms the settled rule that an antitrust plaintiff must prove that the violation caused his alleged injury. The Petitioner both mischaracterizes and ignores the evidence and misconstrues the Fifth Circuit's opinion in an effort to place it "at the front of an increasingly strident movement to constrict the scope of private antitrust claims by elevating the plaintiff's burden of proof" (Petition at 13.)

Respondent introduced evidence, not denied by Petitioner, that established the following facts: (1) on some of the jobs which, according to Petitioner's expert witness, Southwestern would have had a lower bid than Semco if Southwestern had had the benefit of Semco's labor agreement, another competitor made the lowest bid and received the work, and (2) Southwestern's costs increased markedly during the damage period because it made management changes, purchased new manufacturing equipment, changed the composition of its work force, began the use of mass production product runs and made changes in the method of estimating jobs, all of these changes impacting on Southwestern's profitability. Evidence also was introduced to show that on the only product manufactured by both Semco and Southwestern and on which they directly competed, production worker wages, which were the alleged unlawful wage advantage, were not used by Semco in estimating jobs. In fact, the evidence established that in 1982, when there was no asserted conspiracy and Southwestern had the same wage rates and use of production workers as Semco, the operating profit of its Sheet Metal Products Division had decreased from its actual level in 1981. In the face of this evidence that the decrease in its profits during the damage period were caused by factors other than Semco's supposed wage advantage, Southwestern did not offer evidence to show that on *any* job on which both bid, and on which

according to Southwestern's expert it would have been able to bid lower than Semco if it too had had the benefit of the alleged unlawful wage advantage, the job was awarded to Semco rather than to another competitor. In other words, there was absolutely no evidence that Semco actually got a job that Southwestern would have obtained but for the alleged violation of the antitrust laws. There simply was no evidence of a causal link between the violation and Petitioner's injury.

The Fifth Circuit has not adopted a burden of proof which conflicts with Supreme Court precedent or which elevates a private antitrust plaintiff's burden of proof of fact of damage. The court merely found that Petitioner's expert, who used a regression analysis to establish the fact of damage, did not present sufficient evidence of the fact of injury. The Fifth Circuit said in Part II of its opinion (Appendix 3):

> "Even if the adjusted Semco bid would have exceeded Southwestern's bid, Roth (Southwestern's expert) could not conclude that Southwestern would have received the bid . . . We find nothing in the record to indicate that of all bids submitted, Southwestern would have won the bid but for Semco's wage advantage. Southwestern's proof completely ignores *all other bidders.*" (Emphasis by the Court)

Roth's economic analysis also ignored numerous other factors which would have had an effect in the market place. His regression analysis was based on only three factors, and he totally ignored all other causes and factors which could have affected bidding and the competitive market situation.

Having ignored this evidence, Petitioner then misreads the opinion below as holding that "a bidder who alleges antitrust violations must establish affirmatively, that is to an absolute certainty, that no other bidder could have received a specific bid as a predicate to recovery" (Petition

at 10). According to Petitioner, the jury could reasonably infer on competitive jobs there were only two bidders or that only Southwestern's and Semco's bids were material to the award, although in the stipulated national market there were many competitors and many competitive bids.

What the Fifth Circuit actually held however, is summarized in the last paragraph of Part II of the opinion (Appendix 3). The Court said:

> At most, Southwestern's evidence of fact of injury suggests that something happened to Southwestern's profitability during 1981, that Semco was a competitor, and that Semco had an advantageous labor agreement. Not *one* instance is presented where, but for Semco's wage advantage, Southwestern would have won *or was likely* to have won. *Nor is there evidence that Semco's wage advantage exerted such an influence on other competitors' bidding that Southwestern had reduced profits.* Southwestern did not present sufficient evidence to lead reasonable and fair minded jurors to reach different conclusions; its evidence calls for speculation. The district court therefore erred in denying Semco's motion for a directed verdict." (Emphasis added)

Contrary to Petitioner's reading of the opinion, the court did not hold that Petitioner was "required to prove in its case-in-chief that the defendant's unlawful conduct was the sole proximate cause of its injury" (Petition at 18) or that an antitrust plaintiff "must rely on a specific lost sale (or bid)." (Petition at 21). A fair reading of the opinion does not support Petitioner's conclusion that it "requires a complete foreclosure of potential alternative sources of a Section 4 plaintiff's injury" (Petition at 19). What the court actually holds, and all that it holds, is that based upon the totality of the evidence in this case Petitioner failed to establish the causal link between the alleged violation of the antitrust laws and its injury. That is, it "did not present sufficient

evidence (of the fact of damage) to lead reasonable and fair minded jurors to reach different conclusions."

The opinion of the Fifth Circuit in this case is nothing more and nothing less than an affirmation of the well-established rule that the plaintiff must prove that the antitrust violation caused injury to him; and although he need not prove that it was the sole cause, he must show that it was a material cause of his injury. *Perkins,* 395 U.S. at 648; *Zenith,* 395 U.S. at 114, n.9. Mere proof of a violation of the antitrust laws and proof that the plaintiff has suffered some damages, which is the most that can be inferred from Petitioner's evidence, is insufficient, since it establishes only that his injury may have, not that it did, result from the violation. *Brunswick,* 429 U.S. at 486. The opinion below breaks no new antitrust ground, the arguments of the Petitioner to the contrary notwithstanding.

IV. *The Judgment of the Court of Appeals is Correct*

A writ of certiorari should not be granted because, in any event, the judgment of the court below is correct. Having found Southwestern's failure to establish the fact of damage to be dispositive, the Fifth Circuit limited its opinion to that single issue and did not consider other issues raised by Semco, as stated in Part I of the opinion.

The alleged antitrust violation in this case arises out of a labor agreement between a union and an employer. Specifically, Petitioner claims that it was injured in its business or property because the Business Agent of Local 188 of the Sheet Metal Workers' International Association entered into an agreement with Semco covering the wages, hours and working conditions of the employees of Semco, which contained a provision permitting the employment of

employees classified as "production workers" in the ratio of one apprentice and three production workers for each three journeymen. Although Southwestern formerly had an agreement with the union which allowed the use of production workers, its contract then in effect did not contain such a provision. Southwestern's complaint in this case is the availability to Semco of such lower wage rate production workers. It alleged and attempted to prove that as a result of Semco's labor contract, it had lower labor costs and was enabled to submit lower bids on some work than Southwestern was, thus causing it to lose jobs and reducing its profit.

It is clear that agreements entered into between a union and an employer in the context of a collective bargaining relationship cannot be the basis for antitrust liability, even though there are direct restraints on the business market which have substantial anticompetitive effects, both actual and potential, where such effects flow from the elimination of competition over wages and working conditions. *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975). See also *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Company,* 381 U.S. 676 (1965). This exemption from the antitrust laws has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. *Connell,* 421 U.S. at 635. An agreement between a union and an employer falls outside the scope of the labor exemption and becomes subject to the antitrust laws only if the union agrees to surrender its freedom freely to negotiate as its own best interests may dictate and to take a certain predetermined position when it bargains with another employer. *United Mine Workers of America v. Pennington,* 381 U.S. 657, 668 (1965).

In the case at bar the labor exemption applies and there is no antitrust liability unless there was evidence that the union agreed that it would refuse to enter into an agreement with Southwestern for the use of production workers. There was no evidence nor any finding by the jury of such an agreement. All that the evidence shows is that Semco's October 1980 agreement with the union was in some respects a more favorable labor contract than Southwestern's then existing labor agreement, which was effective July 1, 1979 and was not reopenable until June 30, 1981. In fact, the union and Southwestern negotiated an agreement effective July 1, 1981, which did not provide for the use of production workers, despite the fact that the union was represented in the negotiations by the successor to Mesa as Business Manager who was not alleged to be a member of the conspiracy with Semco. Therefore there was no antitrust liability and the judgment of the court below was correct whether or not its holding on the burden of proving fact of damage was proper.

As indicated above, the evidence shows that Semco entered into an agreement with the union providing for the use of production workers, that Southwestern had a collective bargaining agreement effective July 1, 1979, which remained in effect until June 30, 1981, after alleged conspirator Mesa had ceased to have any authority to act for the union, and that Southwestern then negotiated a new agreement with the union, effective July 1, 1981, which did not provide for production workers. This is undisputed. Therefore, whether or not the labor exemption is applicable in this case, Southwestern was foreclosed from using production workers by its own collective bargaining agreements, not by Semco's contract with the union. Under the evidence the Semco October 1980 agreement, which is alleged to have

violated the antitrust laws, could not possibly have caused Southwestern's injury, if any. The causal link between the Respondent's alleged violation of the antitrust laws and the Petitioner's injury is lacking and the court below was correct in holding that Petitioner was not entitled to recover antitrust damages. A judgment in favor of Petitioner would simply reward it for its inability or failure to have negotiated in 1979 as good a labor agreement as Respondent was able to negotiate in 1980. If there was injury as a result, it is not the type of injury that the antitrust laws were intended to prevent. To impose liability under the circumstances would, in fact, be destructive of the very values which the antitrust laws were designed to protect.

The judgment of the court below is correct also because Southwestern's proof relied exclusively upon giving it the theoretical benefit of the alleged conspiratorial Semco October 1980 agreement negotiated with Mesa. The fact of damage, however, can be established only "by disregarding the special conspiratorial price . . . not by hypothetical broadening of the conspiracy to give (the defendant's) abnormally low price to (the plaintiff) as well." *M. C. Manufacturing Company, Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975), *cert. denied*, 424 U. S. 968 (1976). See also *Olympia Company, Inc. v. Celotex Corporation*, 771 F.2d 888, 892 (5th Cir. 1985). Thus, the evidence offered by Southwestern failed to prove the fact of damage since it was premised on giving Southwestern the benefit of Semco's alleged conspiratorial wage advantage and, as the Fifth Circuit held, the trial court erred in not granting Semco's motion for a directed verdict.

CONCLUSION

None of the reasons advanced by Petitioner justifies granting a writ of certiorari. The court below correctly held that an antitrust plaintiff must show that the defendant's violation of the antitrust laws was a material cause of his injury in order to establish the fact of damage or injury in fact. Unless the plaintiff satisfies this burden of proof he is not entitled to recover damages. The evidence offered by the Petitioner did not establish the essential element of causation. Furthermore, for the reasons heretofore stated, the judgment of the court of appeals was correct in any event, and for that additional reason the Petition should be denied.

The facts in this case are such that there is a serious question whether it should be treated as an antitrust cause of action in the first place, although the Petitioner attempts to cast his damage claim in an antitrust mold. Even if it is viewed as an antitrust case, however, the circumstances under which Petitioner's claim arises are so markedly different from the usual antitrust case that the decision below turns on its own unique facts and could affect few others than the litigants. It is respectfully submitted, therefore, that it would be an especially poor vehicle for the Court to use to explain or clarify the antitrust laws or to resolve perceived conflicts among the courts of appeals.

Respectfully submitted,

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February 13, 1987

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has served the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Southwestern Sheet Metal Works, Inc., on Petitioner's counsel of record by mailing copies to the following persons:

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Such service was made on February 12, 1987.

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Counsel of Record for Respondent

No. 86-828

IN THE

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On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITIONER'S REPLY BRIEF

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OCTOBER TERM, 1987

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v.

SEMCO MANUFACTURING, INC.,
Respondent.[1]

PETITIONER'S REPLY BRIEF

In viewing this antitrust case, where a labor union was secretly allied with a competitor for anticompetitive purposes, the Fifth Circuit has fastened its reversal upon a view that the Plaintiff did not meet its burden of proof in demonstrating fact of injury. Such a view of the record and the legal standard to be applied is erroneous.

In its Opposition Brief, Respondent Semco Manufacturing, Inc. ("Semco") does not dispute the necessity for clarification of the legal standards governing a plaintiff's evidentiary burdens in establishing fact of injury. Semco tacitly concedes the existence of a split among the circuits concerning the proper evidentiary standard for proving fact of injury. Significantly, Semco does not challenge the standard set by this Court that proof of injury to a fair degree of certainty will establish

[1] A listing of parties and other interested persons, in accordance with Rule 28.1, is made by reference to the list identified in Southwestern's Petition at p. iii.

antitrust liability.[2] Finally, Semco does not deny that a rule requiring plaintiffs to disprove alternative causes would create insurmountable burdens for antitrust plaintiffs.

The opinion below reversed the jury's verdict for Southwestern solely because the plaintiff's proof of fact of injury did not present evidence negating third party bidders on jobs where Southwestern competed with Semco. Semco claims that this case is not the proper vehicle for reviewing the Fifth Circuit's evidentiary requirement for proving fact of injury.

Semco's characterization of the evidence, however, seriously distorts the record before this Court.[3] Semco principally limits its evidentiary references to facts and inferences it advanced in the trial court, and argues that "the totality of the record" supports those claims. (Opposition Brief at p. 13). The relevant record for appeal, however, confines review to the facts and inferences that *support* the jury's verdict. It is these facts that are omitted from the Opposition Brief.

The misleading factual characterizations in the Opposition Brief are evident from their comparison with some of the actual record facts that supported the jury's finding of fact of injury:

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[2] Semco challenges the applicability of Southwestern's cited Supreme Court decisions to the fact of injury issue; that challenge is readily refuted by reference to those decisions, however, and need not be belabored in this Reply.

[3] Semco's first question presented, casting the agreement between Semco and Mesa as a labor "negotiation" (Opposition Brief at pp. i, 2), ignores the jury's finding of an unlawful conspiracy to uniquely favor Semco and thereby to disadvantage Southwestern. For purposes of this Court's review, the existence of an unlawful conspiracy is unquestioned. The only issue addressed by the Court of Appeals was whether Southwestern had sustained its burden of proving an injury from the violation.

Semco's Factual Characterization In Opposition Brief	Actual Record Evidence Supporting Jury Verdict
Semco did not use the production worker wage advantage in estimating bids on jobs (Opposition Brief at p. 11).	Semco in fact used the unlawfully obtained advantage in calculating its bids (direct testimony of former Semco comptroller and budget analyst; expert testimony of economist based on Semco data).
There was no evidence that Southwestern would have bid lower than Semco on specific jobs absent the unlawful wage advantage (Opposition Brief at pp. 3, 4, 11, 12).	The evidence identified (i) specific jobs on which Southwestern and Semco bid (Semco's documents, including its designation of jobs it had quoted and won; testimony of Southwestern's vice president; numerous bid documents and exhibits); (ii) the amount of actual bids submitted by Southwestern and Semco (numerous bid documents); and (iii) the amount that Semco's bids on specific jobs were affected, and adjustment to such bids by eliminating the unlawful wage advantage, establishing specific jobs on which Southwestern's originally higher bid would have been lower (expert testimony of economist; exhibit showing adjusted amounts on specific jobs).

Semco's Factual Characterization In Opposition Brief	Actual Record Evidence Supporting Jury Verdict
Southwestern's evidence on fact of damage was premised on giving Southwestern the benefit of Semco's wage advantage (Opposition Brief at p. 17).	Fact of injury was shown in part by adjusting Semco's bids by the amount of the favorable wage advantage (expert testimony of economist; exhibit).
Other competing companies also submitted competitive bids and were awarded contracts on jobs which were bid by both Semco and Southwestern (Opposition Brief at p. 3).[4]	Semco does not know what other manufacturers were bidding on jobs for spiral pipe (testimony of Semco's manufacturer's representative).

The factual record, by its scope and detail, provides a case well-suited to define the serious legal issues relating to proof of injury among bidding competitors.

Finally, the Fifth Circuit's holding disregarded evidence of injury other than specific lost bids. Semco ignores the independent issue of whether evidence aside from designated bids can support a finding of injury in fact to an antitrust plaintiff.

In summary, Semco does not seriously question the need to review injury in fact standards and burdens. The record evidence favorable to the jury verdict below sharply focuses these

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[4] Through cross-examination, Semco's counsel attempted to suggest that on some jobs third parties may have been successful. Only hearsay evidence was directed to the issue, however, and this purported to address but a few of the numerous competitive situations before the jury. The record is straightforward that on certain jobs Southwestern's bids would have been lower than Semco's bids had the latter not used the wage advantage.

legal issues that have split the lower courts.[5] The evidence supports Southwestern's jury verdict, unless Southwestern must foreclose alternative sources of its injury by disproving the existence of successful third party bidders on every job. This single distinction undergirds the Fifth Circuit's decision in this case, and the record affords this Court the proper means to address and clarify the standard of proof for a private antitrust plaintiff in establishing fact of injury.

Petitioner therefore reurges this Court to review the decision of the Fifth Circuit and to grant the writ of certiorari.

Respectfully submitted,

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[5] Semco attempts to avoid review of the appellate decision by urging applicability of a labor exemption, *inter alia,* to its anticompetitive conduct. The Fifth Circuit did not accept any of these as a basis for its reversal and therefore none is before this Court. The factual record, as well as arguments and authorities, support the rejection below of Semco's contentions on these separate issues.

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has served the foregoing Petitioner's Reply Brief on Respondent's counsel of record by mailing copies to the following persons on February 19, 1987:

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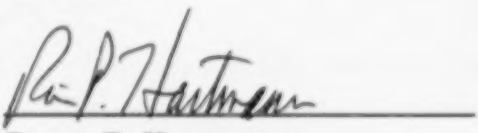

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